No. 14-723

IN THE

Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY BENEFIT PLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS

The American Association for Justice respectfully submits this brief as amicus curiae to address the single issue in this case, whether an ERISA plan fiduciary can hold a plan participant or beneficiary personally liable to reimburse the plan for benefits after the participant or beneficiary dissipated settlement funds owed to the plan under a reimbursement provision.[1]

The American Association for Justice is a voluntary bar association of trial lawyers who primarily represent individual plaintiffs in personal injury cases and other civil actions. Although the Court's resolution of this question may affect reimbursement of pension and disability benefits, the American Association for Justice is primarily concerned with its impact on injured victims who are targeted by recoupment companies demanding repayment of medical benefits. American Association for Justice members frequently represent those injured victims and must deal with the practical problems posed by aggressive enforcement of obscure, opaque, and unfair reimbursement provisions.

The decision below, and the decisions of other federal circuit courts that permit ERISA plan fiduciaries to satisfy their reimbursement claims out of the general assets of their beneficiaries, does not

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[1] Blanket letters of consent to the filing of amicus briefs have been filed with the Court by Petitioner and Respondent. The undersigned counsel for *amicus curiae* affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

grant "appropriate equitable relief," is not necessary to protect the rights of ERISA plans, will not benefit ERISA plans and plan participants generally, and will undermine ERISA's purpose of fostering employee benefit plans.

The American Association for Justice is concerned that affirmance of the decision below will have a devastating and unfair impact on individual workers. At a time when an employee has been ill or seriously injured due to the fault of a third party, court should not invite aggressive collection efforts by plan fiduciaries, insurers, and the recoupment industry.

SUMMARY OF ARGUMENT

1. The court below held that the ERISA plan could sue participant Mr. Montanile for reimbursement of medical benefits, despite the fact that the plan had agreed to obtain reimbursement only out of the proceeds obtained from a third party responsible for the injury and despite the fact that Montanile had already dissipated those funds. The Eleventh Circuit held that, once the plan's equitable lien by agreement attached to the settlement funds, subsequent dissipation of those funds was of no consequence.

A cornerstone precept in this Court's ERISA jurisprudence is that Congress limited fiduciaries suing under ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), to relief that was typically available in equity. A fiduciary may enforce a contract provision for reimbursement of health care benefits by imposing an equitable lien on recoveries from third party tortfeasors. Congress did not authorize a fiduciary to

sue a participant for personal liability for breach of contract, a remedy at law.

The Eleventh Circuit's ruling, and similar holdings by five other federal circuit courts of appeals, misreads this Court's discussion of "tracing" in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 364-65 (2006). The Court there explained that a plaintiff asserting a restitutionary equitable lien to restore property to plaintiff must show that the attached property is, or can be traced to, property in the *plaintiff's* hands, a requirement that does not apply to equitable liens by agreement. The lower court, however, conflated that requirement with a similar tracing rule that does apply to liens by agreement. If the defendant has exchanged the res for other property, the lienholder may transfer the lien to the new property or to the old property in the hands of a new owner. In either instance, the plaintiff must trace the property sought to be recovered back to the initial res in the *defendant's* hands.

But there must be a res. A fundamental rule of equity is that an equitable lien lives only so long as the res remains intact. This principle applied to restitutionary equitable liens as well as to liens created by contract. Nothing in *Sereboff* suggests otherwise.

2. Nor would extending the plan's right of reimbursement to reach an individual participant's general assets inure to the benefit of the other plan members. Proponents have contended that repayment of medical benefits from tort proceeds reduces the health care premiums for all plan participants. However, a large percentage of recovered funds is paid over to recoupment firms that locate and collect such

reimbursements. In addition, most reimbursements do not go directly into plan assets, but rather to insurance companies that operate fully insured plans or that provide stop-loss coverage for self-funded plans. Reimbursements are not factored into the insurers' ratemaking process, but are often diverted to other purposes, including shareholder dividends and executive compensation.

Even if reimbursed benefits were devoted entirely to reducing premiums, the average savings per covered participant would amount to less than one-tenth of one percent. More fundamentally, the purpose of insurance is to spread the risk of a large and unexpected loss over a pool of participants through the assessment of premiums. Shifting large losses from the pool of participants onto the shoulders of a few injured individuals in order to lower premiums is insurance running in reverse.

3. Expanding the equitable relief available to a fiduciary to include recovery from a participant's general assets is unnecessary to protect the plan's reimbursement rights. The plan could assert its own right of subrogation to recover from the third party directly, or it could intervene in the participant's lawsuit. The plan also has the option of compromising for less than full reimbursement when the third party settlement is inadequate. Fears that participants will quickly dissipate settlement proceeds to avoid their plan obligations are overblown. Those funds are paid over to the participant's counsel, who is bound by professional ethics rules to protect the interests of the holders of valid liens.

At the same time, expanding the reach of plan reimbursement to allow recovery from a participant's

general assets would weaken the plan's incentive to settle its reimbursement claims promptly and to compromise when third party funds are insufficient. Affirmance by the Court in this case will invite more aggressive recovery tactics on the part of plans and recoupment companies. For example, plans may provide in their reimbursement "agreements" for recovery against a participant's other assets when the third-party tort settlement does not fully repay the plan.

Many plan participants will simply reject the option of suing a responsible third party if there is a real prospect they could prevail but recover nothing or perhaps even become financially worse off. Attorneys, too, will decline cases in which there are large ERISA-covered medical costs. Thus, the result of the aggressive recoupment efforts pursued in this case will be far fewer recoveries by ERISA plans.

ARGUMENT

I. The Court Below Misapplied the Principles of Equitable Relief Discussed by This Court in *Sereboff*.

The American Association for Justice respectfully addresses this Court regarding the single issue presented in this case: Whether an ERISA fiduciary can bring suit under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to hold a plan participant personally liable for repayment of health care benefits where the plan provided for reimbursement solely out of tort proceeds that the participant has dissipated. The American Association for Justice urges this Court to reject the lower court's drastic expansion of the expressly limited equitable relief provided to

fiduciaries by Congress. Permitting the plan to satisfy its reimbursement claim out of other property of the participant is not authorized by the contract in this case and contravenes this Court's clear precedents regarding the scope of relief permitted by § 502(a)(3).

A. The lower court's drastic expansion of the plan's equitable lien on tort settlement funds to reach a participant's general assets was based on an erroneous reading of remarks in *Sereboff* concerning "tracing."

A cornerstone precept in this Court's ERISA jurisprudence is that Congress limited fiduciaries suing under ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3) to "appropriate equitable relief" that was "typically available in equity" in the days of "the divided bench." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). In *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), this Court held that such relief could include a restitutionary equitable lien for reimbursement of benefits from a tort award, so long as those funds were within the possession and control of the defendant. *Id.* at 213-14. The Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), permitted the fiduciary to enforce an equitable lien based on an agreement to reimburse the plan out of proceeds of a tort award that the Sereboffs had preserved in a separate investment account. *Id.* at 363-64. Similarly, in *U.S. Airways, Inc. v. McCutchen*, --- U.S. ----, 133 S. Ct. 1537 (2013), this Court held that a plan could impose an equitable lien on tort proceeds held in a separate account, after reduction for the plan's share of compensation for the attorney who obtained the fund. *Id.* at 1543. The parties agreed

that, as in *Sereboff*, the plan "could bring an action under § 502(a)(3) seeking *the* funds that its beneficiaries had promised to turn over." *Id.* at 1545 (emphasis added).

In each instance, the availability of the equitable remedy necessarily depended upon the continued existence of the fund to which that lien attached. As in the days of the divided bench, if that res is no longer intact, plaintiff continues to have a contract right to reimbursement, but the remedy of an equitable lien no longer is available. Justice Scalia, writing for the Court in *Knudson*, made clear this fundamental principle:

> [W]here "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]."

534 U.S. at 213-14 (quoting *Restatement (First) of Restitution*, § 215, Comment a, at 867 (1937)).

In this case, Mr. Montanile was a participant in the National Elevator Industry Health Benefit Plan, administered by Respondent Trustees. Pet. App. 1-2. In 2008, he was seriously injured in an auto accident by a drunk driver, and the Plan paid his initial medical expenses of $121,044. *Id.* at 6. He retained a trial lawyer who obtained a financial settlement of his claims against the other driver. *Id.* Montanile also retained an experienced ERISA attorney to reach an accommodation with the Trustees regarding the

Plan's claims for reimbursement under the terms of the Summary Plan Description. Pet. 12. Negotiations were not successful and the Trustees filed this action on July 11, 2012. *See* Pet. App. 23-25. By that time, however, Montanile had used up most of the remaining settlement funds to pay bills and care for himself and his young daughter. Pet. 12.

The magistrate judge granted summary judgment in favor of the Trustees for the entire amount sought in reimbursement, despite the fact that the fund identified in the SPD as the sole source of reimbursement was no longer in Montanile's possession, and was not in anyone's possession as an identifiable fund. The district court acknowledged the Eleventh Circuit's previously stated position that "[u]nder *Knudson* [and] *Sereboff* the most important consideration is not the identity of the defendant, but rather *that the settlement proceeds are still intact*, and thus constitute an identifiable res.' Pet. App. 39 (quoting *Admin. Comm. for Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Horton*, 513 F.3d 1223, 1229 (11th Cir. 2008)). Nevertheless, the magistrate judge stated that the Eleventh Circuit had not "had occasion to address this issue of dissipation." *Id.*

Instead, the magistrate judge found "particular significance" in *Sereboff's* statement that the "strict tracing rules" required for restitutionary equitable liens do not apply to equitable liens by agreement. *See id.* at 36-38 (citing *Sereboff*, 547 U.S. at 365). The magistrate judge embraced what he perceived as "the majority view" that, under *Sereboff*, "a beneficiary's dissipation of assets is immaterial when a fiduciary asserts an equitable lien by agreement." *Id.* at 40. All that was required, the magistrate judge stated, was

that Montanile had notice of the reimbursement obligation and had possessed the funds at some point. *Id.* at 43-44.

The Eleventh Circuit affirmed without extended discussion, relying on its recent holding in *AirTran Airways, Inc. v. Elem*, 767 F.3d 1192 (11th Cir. 2014). There, the Eleventh Circuit stated that "[i]n *Sereboff*, the Supreme Court made clear that AirTran need not trace the settlement fund back to AirTran to enforce its equitable lien by agreement." *Id.* at 1198. The court concluded that "[i]t matters not whether the settlement funds have since been disbursed or commingled with other funds." *Id.* The court added that a majority of federal circuits had similarly interpreted this Court's tracing discussion in *Sereboff*. *Id.* *See Cusson v. Liberty Life Assur. Co. of Boston*, 592 F.3d 215, 231 (1st Cir. 2010) (allowing ERISA to recover overpayment of long-term disability benefits years after their original payment, even though "Liberty has not identified a specific account in which the funds are kept or proven that they are still in Cusson's possession" (citing *Sereboff*)); *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 664 (2d Cir. 2013) (ERISA plan may seek return of overpayments of disability benefits "whether or not the beneficiary remains in possession of those particular dollars" (citing *Sereboff*)); *Funk v. CIGNA Group Ins.*, 648 F.3d 182, 194 (3d Cir. 2011) (ERISA plan could recover overpaid disability benefits and, under *Sereboff*, if "there was an equitable lien by agreement dissipation of the funds [is] immaterial."); *Longaberger Co. v. Kolt*, 586 F.3d 459, 466-67 (6th Cir. 2009) (plan could recover reimbursement of medical benefits based on equitable lien on tort settlement funds, despite the fact that most of the funds had been disbursed, relying on *Sereboff*'s rejection of tracing

requirement); *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008) (plan may recover overpayments of disability benefits based on equitable lien by agreement, even though "the benefits it paid Gutta are not specifically traceable to Gutta's current assets because of commingling or dissipation" (citing *Sereboff*)). The Trustees in this case also rely on this interpretation of *Sereboff*. Br. for Resp't on Pet. 17.

This is a plain misreading of Chief Justice Roberts's opinion. In addressing the Sereboffs' objections, he acknowledged that when an equitable lien is imposed as a restitutionary remedy to restore a thing unlawfully taken from the plaintiff, the plaintiff must be able to "trace *his* [plaintiff's] money or property to some particular funds or assets" that plaintiff seeks as restitution. 547 U.S. at 364-65. An equitable lien by agreement, however, is a "different species of relief." *Id.* at 365. Chief Justice Roberts pointed to the example of *Barnes v. Alexander*, 232 U.S. 117 (1914), where attorneys Street and Alexander were held to have an equitable lien on a portion of a contingency fee obtained in a case by Barnes, based on the attorneys' agreement. As the Chief Justice noted, Street and Alexander "could not identify an asset they originally possessed, which was improperly acquired and converted into property the defendant held, yet that did not preclude them from securing an equitable lien." 547 U.S. at 365. Similarly, he wrote for the Court, the fact that Mid Atlantic was not seeking restoration of property that it once possessed was "of no consequence." What was essential was that Mid Atlantic sought recovery from an "equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law." *Id.* at 362-63.

Nothing in this discussion casts doubt on the proposition highlighted by Justice Scalia in *Knudson*, 534 U.S. 204, that an equitable lien lives only so long as the thing that is subject of the lien remains intact and that "where the property [sought to be recovered] or its proceeds have been dissipated," plaintiff's remedy is at law, not in equity. *Id.* at 213-14. This is not a principle of restitution; it is an essential feature of equitable liens generally.

The lower courts have erroneously conflated the "strict tracing rules" applicable to a lien to restore property wrongfully taken from the plaintiff, which must be traced back to *plaintiff's* hands, with a separate requirement applicable to equitable liens based on contract, where the holder of the identified res has exchanged it for other property. The plaintiff may impose the lien on the new property. *Restatement (First) of Trusts* § 202(1) (1935) ("Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled to enforce an equitable lien upon it as long as the product of the trust property is held by the trustee and can be traced.").

Similarly, if the trustee has transferred the res to a third party, the lienholder could recover that property, unless the third party were a bona fide purchaser without notice of the lien. *Restatement (First) of Restitution* § 161, comment d (1937) ("If property which is subject to an equitable lien is transferred to a third person who has notice of the equitable lien or who does not give value, the equitable lien can be enforced against the property in the hands of the third person.").

In either instance, the lienholder must trace the sought-after property back to the original property that was subject to an equitable lien in the *defendant's* hands.

But the res must remain intact, not only when the lien is created, but later when plaintiff seeks its enforcement. "An equitable lien can be established *and enforced* only if there is some property which is subject to the lien." *Restatement (First) of Restitution* § 161, comment e (1937) (emphasis added). Barnes could well have traded the promised portion of the contingency fee for a fine wine, which the attorneys could recover from Barnes or from a transferee with notice. But if Barnes had drunk it or poured it down the drain, the attorneys would have a legal claim for breach of contract against Barnes, not an equitable lien on his other property.

National City Bank of New York v. Hotchkiss, 231 U.S. 50 (1913), which the Court in *Barnes v. Alexander* relied upon, 232 U.S. at 121, stands for just this principle. In that case, where funds loaned to a broker were commingled with the bank's general assets, the bank lost its equitable lien and became a general creditor. As Justice Holmes explained, "A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust moneys have gone into it. . As all trace of the bank's money was lost when it entered the stream of the firm's general property, there can be no right of subrogation." 231 U.S. at 57-58.

The Ninth, Eighth, and Fifth Circuits properly reject the misinterpretation of *Sereboff* advocated by Respondent and the court below. *See Bilyeu v. Morgan*

Stanley Long Term Disability Plan, 683 F.3d 1083, 1095 (9th Cir. 2012) ("Nothing in *Sereboff* suggests that a fiduciary can enforce an equitable lien against a beneficiary's *general assets* when specifically identified funds are no longer in a beneficiary's possession."); *Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888, 896-97 (8th Cir. 2012) (*Knudson* and *Sereboff* allow an ERISA plan to recover on an equitable lien on "specifically identifiable funds that [are] within the possession and control of [the defendant]," but do not permit personal liability after those funds have been disbursed); *ACS Recovery Servs., Inc. v. Griffin*, 723 F.3d 518, 527 (5th Cir. 2013) (en banc), *cert. denied sub nom. Larry Griffin Special Needs Trust v. ACS Recovery Servs., Inc.*, --- U.S. ----, 134 S. Ct. 618 (2013) (ERISA plan could recover on an equitable lien by agreement from a third-party special needs trust. "Under *Knudson*, [and] *Sereboff*, the most important consideration is not the identity of the defendant, but rather that the settlement proceeds are still intact.").

B. An equitable lien was an available remedy only so long as the rest remained intact.

In the days of a "divided bench" it was well settled that an equitable lien was a typically available remedy only so long as the res to be recovered remained identifiably intact. Professor Pomeroy declared this to be an essential feature of equitable liens created by a contract:

> [E]quity recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract

> deals, which it calls a "lien," . . . by means of which the plaintiff is enabled to follow *the identical thing*, and to enforce the defendant's obligation by a remedy *which operates directly upon that thing*.

4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1234 (Spencer W. Symons ed., 5th ed. 1941) (emphasis added). Such an equitable lien by agreement "is enforceable against the *property in the hands* not only of the original contractor" but also in the hands of purchasers with notice. *Id.* at § 1235 (emphasis added).

As noted earlier, equity might extend such liens to reach new property or a new owner, if the property to be attached can be traced to the initial res in the hands of the *defendant*.

> No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, *provided it can be identified as a distinct fund*, and is not so mingled up with other moneys or property that it can no longer be specifically separated.

3 Pomeroy, *supra*, at § 1058 (emphasis added).

This rule was primarily concerned with avoiding the unfairness to other creditors that would result from allowing one creditor who had agreed to repayment solely out of a particular fund or asset that has dissipated to recover from the debtor's other assets.

> Thus, if the trustee sells trust property and dissipates the proceeds, the beneficiary is not entitled to priority over other creditors of the trustee. The beneficiary is entitled to priority only if and to the extent that he can trace the trust property into a product. *He must prove not only that the trustee once had the trust property or its product, but that he still holds the trust property,* or property which is in whole or in part the product of the trust property. But *if it is shown that the property or its proceeds has been dissipated so that no product remains . . his claim is only that of a general creditor* of the trustee.

Restatement (First) of Trusts § 202, comment o (1935) (emphasis added). The scope of equitable relief available under § 502(a)(3) is no broader.

II. Extending the Plan's Right of Reimbursement to Reach a Participant's General Assets Will Not Benefit Plan Participants and Will Not Further the Purpose of Congress in Enacting ERISA.

A. Expanding the reimbursement remedies permitted to ERISA plans will not significantly benefit plan participants.

Respondent argued to the court below that holding a participant personally liable for reimbursement of benefits if the proceeds of a tort award have been dissipated is "better policy": Otherwise the unreimbursed "cost of medical

treatment caused by third parties would be absorbed by all plan members and beneficiaries through higher contributions and premiums." Br. of Plaintiff-Appellee, *Health Benefit Plan v. Montanile*, 593 Fed. Appx. 903 (11th Cir. 2014) (No. 14-11678), 2014 WL 3384838, at *32-33. In this Court, Respondent contends that the position of the Eighth and Ninth Circuits, limiting the Plan's reimbursements to the identifiable tort proceeds, "will cost plans a portion of those reimbursements, [which] will have to be passed along to others." Br. for Resp't on Pet. 15. There is no evidence, and Respondent suggests none, that health insurance premiums are in fact costlier in those circuits which limit reimbursements.

Nevertheless, other courts have echoed the claim that reimbursement inures to the benefit of all participants and beneficiaries by keeping premiums low. *See, e.g., Zurich Am. Ins. Co. v. O'Hara*, 604 F.3d 1232, 1237-38 (11th Cir. 2010) ("If O'Hara were relieved of his obligation to reimburse Zurich for the medical benefits it paid on his behalf, the cost of those benefits would be defrayed by other plan members and beneficiaries in the form of higher premium payments."); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank*, 500 F.3d 834, 838 (8th Cir. 2007) (similar); *Schwade v. Total Plastics, Inc.*, 837 F. Supp. 2d 1255, 1278 (M.D. Fla. 2011) ("If a plan cannot trust a court to enforce a subrogation right, a beneficiary cannot receive lower premiums."). This Court in *Sereboff* heard similar pleas from ERISA fiduciaries. *See* Brief of Resp'ts, *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006) (No. 05-260), 2006 WL 467696, at *33. No explanation of how such discounting occurs or a single example documenting an ERISA plan's reduction of

premiums as a result of obtaining reimbursement has been forthcoming.

The explanation offered by the Solicitor General was that "an employer who self-insures directly reduces its costs by recovering those costs from a third-party." Br. for the United States as Amicus Curiae, *Sereboff v. Mid-Atlantic Med. Servs., Inc.* 547 U.S. 356 (2006) (No. 05-260), 2006 WL 460876, at *26 n.10. However, as the United States acknowledged, only 300,000 of 2.5 million ERISA plans are self-insured. *Id.* Two-thirds of those are partially insured by stop-loss insurance. Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits: 2014 Annual Survey* 174 (2014), *available at* http://ehbs.kff.org. Thus, for some 96 percent of all plans, reimbursements of any appreciable size will not go directly into plan assets to reduce the fund's costs, but will go to an insurance company. The United States added that limiting reimbursement "necessarily imposes higher costs on insurers and . insured plans as well." *Id.* But this Court should not simply assume that reducing an insurance company's insurer's costs by expanding reimbursement "necessarily" translates into lower premiums. There are plenty of uses for found money.

One amicus brief in *Sereboff* did contend: "Reimbursement and subrogation results are factored into claims experience" which is used by insurers and plans as a basis for setting rates. Amicus Curiae Br. of America's Health Ins. Plans, Inc., *et al.*, *Sereboff v. Mid Atlantic Medical Service, Inc.*, 547 U.S. 346 (2006) (No. 05-260), 2006 WL 460877, at *14-15 & n.19. However, the sole support offered for this proposition was Actuarial Standard of Practice No. 5,

Incurred Health and Disability Claims, which states that an actuary "should take into account the relevant organizational practices and regulatory requirements related to subrogation." *Id.* at 15 n.19. The standards themselves state that they "seek to define an appropriate level of practice" but do not necessarily reflect current practices. Actuarial Standard of Practice No. 1. The amici offered no evidence that the standard is actually followed by ERISA health plans or that it has ever resulted in a reduction in ERISA plan premiums.

To the contrary, there is substantial scholarship indicating that health insurance "premiums themselves are calculated based upon the losses actually incurred, and do not take subrogation recoveries into account." Keith E. Edeus, Jr., *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*, 17 N. Ill. U. L. Rev. 509, 514-15 (1997). *See also* John F. Dobbyn, *Insurance Law in a Nutshell* 384 (4th ed. 2003) (subrogation has not reduced insurance rates because "[i]nsurers consistently fail to introduce the factor of such recoveries into rate-determining formulae"); Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595, 627-31 (2004) (insurers do not consider subrogation when setting insurance rates).

Clear evidence of this can be seen by comparing the rate experience of fully insured ERISA plans, which are subject to state insurance law restrictions on reimbursements and subrogation, with self-insured plans. Most states have anti-subrogation laws, follow the "make whole" doctrine, award

attorney fees based on the common-fund rule, or impose other restrictions on insurers' recovery of reimbursements. Roger M. Baron & Anthony P Lamb, *The Revictimization of Personal Injury Victims by ERISA Subrogation Claims*, 45 Creighton L. Rev. 325, 330 (2012). *See generally*, Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723 (2005) (providing a state-by-state overview). These regulations are applicable to fully insured ERISA plans. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

If the theory were true that restricting ERISA plan reimbursements would cause plan premiums to skyrocket, then we would expect fully insured plans to experience higher rate increases than self-funded plans which are shielded from state insurance law. Instead, according to the authoritative Kaiser Family Foundation survey, the increases in premiums for employee health benefits has been about the same. In fact, the average family premium charged by self-insured plans increased by 73% from 2004 to 2014. Premiums rose only 71% for fully insured plans. *Employer Health Benefits: 2014 Annual Survey*, *supra*, at 21.

If the theory were true, we would also expect to see two groups of competing plans in the insurance market: one at a higher price which does not include reimbursement provisions and another providing the same coverage at a lower premium discounted for the reimbursement savings. Instead, the reimbursement requirement is universal; no-subrogation medical insurance policies are essentially absent from the marketplace, strongly indicating that reimbursements have negligible impact on premiums.

Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 85 (2008).

Where does the reimbursement money go? A portion, of course, goes to the recoupment industry itself. Most companies specializing in subrogation services for health benefit plans "charge based on a tiered pricing model, which can range from 20-40%" of the recovery. Sedgwick Claims Management Services, *Central Subrogation* (2012), *available at* https://www.sedgwickcms.com/services/docs/SubrogationOverview.pdf. It is a $200 million to $400 million industry.[2]

As for the remainder, the "general consensus among legal scholars is this revenue does not flow to the benefit of consumers by reducing insurance rates, but rather increases executive compensation and shareholder payouts." Roger M. Baron & Delia M. Druley, Trial, Journal of the Minnesota Association for Justice, *ERISA Reimbursement Proceeds: Where Does the Money Go?* 10 (Spring 2010). *See also* Dobbyn, *supra*, 384 (Insurers "apply such recoveries to increasing dividends to shareholders"); Scott M. Aronson, *ERISA's Equitable Illusion: The Unjustice of Section 502(a)(3)*, 9 Emp. Rights & Emp. Policy J. 247, 286 (2005) ("Subrogation recoveries are used to

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[2] ERISA plans and related insurers "are collecting in excess of $1 billion annually through the seizure of tort recoveries intended for personal injury victims." Baron & Lamb, *supra*, at 325. Professor Baron asks: "Does society want to provide jobs for bill collectors that are funded by tort recoveries of innocent victims who have suffered catastrophic losses?" Baron, *supra*, at 621.

increase executive compensation or shareholder dividends, not to decrease premiums.").

Even if the amounts recovered by plan fiduciaries in reimbursement were devoted entirely to reducing premiums, the monetary benefit to the average plan participant would be vanishingly small.

Respondent points to industry estimates that "plans recover more than $1 billion annually under reimbursement provisions." Br. for Resp't on Pet. 15. This is admittedly a substantial sum. But, as the Department of Labor reports, ERISA plans provide health care benefits to "some 137 million Americans." U.S. Dep't of Labor, Employee Benefits Security Administration, *Factsheet: Workers' Right to Health Plan Information*, http://www.dol.gov/ebsa/newsroom/fserisa.html (last visited July 10, 2015). The average annual premium for a single employee is $6,025. *Employer Health Benefits, 2014 Annual Survey*, *supra*, at 20. Assuming only 20% is paid to the recoupment company, the reduction in premiums would amount to a miniscule $5.84 per covered person per year, less than one-tenth of one percent of the average annual premium.[3]

Petitioner in this case does not ask this Court to prohibit reimbursement provisions altogether, but only to preclude imposing personal liability in the small fraction of reimbursements where the

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[3] This calculation comports with other recent estimates. *See, e.g.*, E. Farish Percy, *Applying the Common Fund Doctrine to an ERISA-Governed Employee Benefit Plan's Claim for Subrogation or Reimbursement*, 61 Fla. L. Rev. 55, 97 (2009) ("[T]he largest provider of subrogation services reported that . . . [it] recover[ed] an average of $4.80 in subrogation and reimbursement per covered person per year.").

participant or beneficiary has dissipated the tort recovery. The argument that allowing the fiduciary to obtain reimbursement from other assets is necessary to the viability of the plan or would confer any benefit on the other plan participants is risibly overblown.

B. Shifting the burden of large losses to individual beneficiaries in order to lower premiums by a tiny amount is the opposite of insurance and does not further the Congressional aim for ERISA.

The deeper difficulty with Respondent's argument lies in its rejection of the very purpose of insurance, which is to spread the risk of large losses over a large pool of participants. The court below echoed the defective reasoning voiced by the appellate court in *Administrative Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007), where a vehicle accident left Deborah Shank permanently brain-damaged and in a wheelchair. Her tort settlement was woefully inadequate for her medical costs, but was placed in a special needs trust for her future care. The Wal-Mart ERISA plan that had paid her past medical expenses demanded the entire trust amount in reimbursement. The Eighth Circuit acquiesced:

> We acknowledge the difficulty of Shank's personal situation, but we believe the purposes of ERISA are best served by enforcing the Plan as written. Shank would benefit if we denied the Committee its right to full reimbursement, but all other plan

> members would bear the cost in the form of higher premiums.

Id. at 838.[4]

Congress did not intend for ERISA plans to save on premiums for the plan members as a group at the expense of the individual members who have need of the health benefits they have paid for. "The primary purpose of [ERISA] is the protection of *individual* pension rights." H.R. Rep. No. 93-533, pt. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639, 1973 WL 12549.

The argument for aggressive enforcement of reimbursement provisions is that the pool of plan participants must be shielded from relatively small premium costs, even if large losses are thereby shifted to injured individual participants. This is not the purpose of ERISA. This is insurance running in reverse.

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[4] Due to the outrage generated by this result, "Wal-Mart eventually caved to public pressure and agreed to allow the money to remain in the special trust." *See* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 49 & n.1 (2008).

III. Expanding "Appropriate Equitable Relief" to Include Plan Reimbursement Out of a Participant or Beneficiary's General Assets Is Unnecessary to Protect Plans' Reimbursement Rights and Would Undermine the Congressional Purpose of Fostering Employee Benefit Plans.

A. Imposing personal liability on an ERISA plan participant or beneficiary for reimbursement is unnecessary.

The Trustees argue that failure to allow a plan to satisfy its claim to reimbursement from Montanile's general assets would offend the maxim that "[e]quity suffers not a right to be without a remedy." Br. for Resp't on Pet. 20 (quoting *CIGNA Corp.* v. *Amara*, --- U.S. ----, 131 S. Ct. 1866, 1879 (2011)).

To the contrary, as professor Pomeroy made clear, an equitable lien by agreement is not a right; it is a remedy. It allows the plaintiff to enforce some primary right against a particular thing or fund "rather than [providing] a right to recover a sum of money generally out of the defendant's assets. Pomeroy, *supra*, at § 1234. Here, the plan seeks to enforce a contract right to reimbursement. The remedy of an equitable lien on settlement funds is not available when the specified fund is no longer intact. Nevertheless, the plan has an array of options to protect its right to reimbursement.

The plan can assert its right of subrogation and file its own action against the tortfeasor for the amount of the lien, returning any excess to the beneficiary. Secondly, the plan can intervene in the

action filed by its beneficiary and participate in settlement negotiations to insure its reimbursement rights are protected. Third, where, as here, the beneficiary is unable to obtain full compensation from the tortfeasor, the plan can compromise with its beneficiary on a lower reimbursement, rather than litigate for the full amount, with the attendant risk of loss or inability to collect on a judgment. *See* Peter H. Wayne & Mark R. Taylor, *Beware the ERISA Health Plan Lien*, 43 Trial 48, 54 (2007) (recommending to trial lawyers a strategy of "cooperative negotiation").

The plan insists, however, that failure to impose personal liability on a participant who has dissipated the settlement proceeds sets up a perverse incentive for plan beneficiaries "to spend every dollar of settlement funds immediately upon receipt." Br. for Resp't on Pet. 15.

This, as trial lawyers well know, is simply not based in reality. The rules of professional conduct in every state require an attorney to hold tort proceeds subject to valid liens in trust accounts and preclude their disbursement to the client even upon the client's demand. *See, e.g.*, Virginia Legal Ethics Opinion 1747, *Attorney Breaching Contract to Pay Medical Bills Out of Settlement Proceeds*, ("A lawyer owes an ethical duty under Rule 1.15 (c) (now Rule 1.15(b)) to protect the rights of a health care provider to settlement proceeds under client's assignment of funds executed in favor of the health care provider."); California Formal Ethics Opinion 1988-101 (lawyer whose client had agreed to pay recovery proceeds to health care provider may not ignore the agreement and disburse funds to client); Maryland Ethics Opinion 94-19 (1992) (same).

Attorneys are aware of their ethical obligations and have little to gain and much to lose by disbursing to clients settlement funds that are subject to valid ERISA plan liens. *See* Wayne & Taylor, *supra*, at 49. Expanding the equitable lien to allow personal liability of a client who has dissipated funds is simply unnecessary.

B. Imposing personal liability on ERISA participants and beneficiaries will ultimately increase the costs of ERISA plans.

Allowing plan fiduciaries to recover reimbursement out of the general assets of a participant or beneficiary carries perverse incentives of its own.

It is an unhappy fact that tort recoveries often do not fully compensate wrongfully injured plaintiffs. Indeed, "scholarly research documents that more seriously injured victims tend to recover only a part of their total financial losses, notwithstanding the supposed legal entitlement to full compensation." Kenneth S. Abraham, Robert L. Rabin & Paul C. Weiler, *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 San Diego L. Rev. 333, 340 (1993). In fact, the consistent "undercompensation [of personal injury plaintiffs] at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System–And Why Not?* 140 U. Pa. L. Rev. 1147, 1218 (1992).

The court below, in ordering Montanile to reimburse the plan out of funds that were not

identified in the SPD as the source of reimbursement, drastically expands the reach of reimbursement with troublesome consequences. First, the potential availability of participant's general assets removes the plan's incentive to resolve repayment issues promptly and to compromise its reimbursement claim when tort funds are insufficient.

Affirmance in this case may lay the foundation for plans to engage in even more aggressive recoupment practices. For example, if this Court agrees with the Trustees that such personal liability is "appropriate equitable relief," future plans may insert provisions into health benefit plans imposing a contract obligation on beneficiaries to satisfy any deficiency in settlement funds out of their other assets. Plan participants who have been injured by third parties would face the very real prospect of recovering little or even becoming financially worse off after winning their tort case than if they had never brought suit.

That situation obviously cannot be sustained. Many of those wrongfully injured will simply decide not to pursue claims against their tortfeasors, particularly if they have large medical expenses paid by their ERISA plan. Maher & Pathak, *supra*, at 88. The prospect that the plan could take everything won from the wrongdoer *plus* the employee's savings, retirement funds, or other assets would be unbearable. Attorneys, too, will decline to accept such cases. *See* Karen Ertel, *Insurer May Take Share of Damages Award, Supreme Court Rules*, 42 Trial 92, 92 (July 2006).

The primary beneficiaries of expanding the reimbursement reach of plan fiduciaries, in the long

run, will be those individuals or companies who negligently injure or kill and who will not be held accountable. To the extent that accountability for negligence promotes safety, such a rule may lead to increased accident rates and greater medical care claims. At the same time, as a consequence of fewer third-party lawsuits against responsible companies and individuals, the stream of reimbursement money will begin to dry up.

Employees will suffer the greatest adverse impact of more aggressive recoupment efforts. They will continue to lose protection under a law its primary sponsor declared to by "the greatest development in the life of the American worker since Social Security." 120 Cong. Rec. 29, 933 (1974) (statement of Sen. Jacob Javits). They have no voice in choosing the plan or crafting its terms. Yet courts bind employees to plan terms as though they had agreed to them in an arm's length transaction. If the plan pays their medical expenses after an accident, they often find that "coverage" they paid for is treated as a loan to tide them over until a personal injury attorney, paid for entirely by the employee, can obtain an inadequate tort settlement to be turned over to the plan. This Court should not construe ERISA to permit illusive coverage for plan participants and beneficiaries.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to reverse the judgment below.

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Respectfully submitted,

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